

## DEREGULATION: PROCESS AND PROCEDURES THAT GOVERN AGENCY DECISIONMAKING IN AN ERA OF ROLLBACKS

*Bethany A. Davis Noll & Denise A. Grab\**

**Synopsis:** After an election, especially one where the governing party has switched, change might be inevitable. And agency regulations are a prime area where new presidents may seek to make changes. But even in a time of political change, the legal system imposes a degree of predictability and regularity on that process. True to form, since his inauguration in January 2017, President Donald Trump and his agency heads have targeted President Barack Obama’s environmental legacy, by seeking to repeal many energy and environmental regulations. But those attempts are governed by a set of standard rules that provide important and meaningful limits to President Trump’s freedom to roll back regulations that are currently on the books and several have hit some snags. This article provides an overview of the procedural and statutory limits that apply to agencies seeking to change course, and either cancel or suspend regulations that they previously issued. It also discusses several recent examples of agency decision-making to show how these rules work in practice in this era of rollbacks.

|      |   |     |
|------|---|-----|
| I.   | Introduction .....  | 270 |
| II.  | Administrative Procedure Act Requirements .....   | 273 |
|      | A. Notice and Comment Requirements for Repeals .....  | 274 |
|      | B. Notice and Comment Requirements for Changing a Rule’s<br>Effective Date or Compliance Deadlines .....                  | 276 |
|      | C. Reasoned Explanation for Changing Course .....   | 278 |
|      | D. Unique Features of the Arbitrary and Capricious Standard that<br>Apply in the Context of Repeals and Suspensions ..... | 279 |
|      | 1. Consideration of Alternatives Presented in the Original<br>Rulemaking Record .....                                     | 279 |
|      | 2. Consideration of Facts Underlying the Original<br>Regulation .....   | 282 |
|      | 3. Reliance Interests .....   | 284 |
| III. | Statutory Requirements .....  | 285 |
|      | A. Authority to Act .....   | 285 |
|      | B. Mandated Factors .....   | 287 |

---

\* Bethany A. Davis Noll is Litigation Director and Denise A. Grab is Western Regional Director, both at the Institute for Policy Integrity, New York University School of Law. The Institute for Policy Integrity has filed amicus briefs in support of a number of the rules discussed in this article, including the Clean Power Plan. The opinions in this paper are the authors’ own and do not represent those of the Institute for Policy Integrity or New York University School of Law, if any. The authors would like to thank Richard Revesz, Sean Donahue, Susannah Weaver, Rubén Kraiem, E. Donald Elliott, Jack Lienke, Jason A. Schwartz, Avi Zevin, Peter Howard, Jayni Foley Hein, and Caroline Cecot for their insightful comments on drafts of this article, as well as David Cohen for helpful research assistance.

|   |     |
|---|-----|
| C. Ambiguous or Unambiguous Statute ..... | 287 |
| IV. Assessment of Costs and Benefits..... | 290 |
| V. Conclusion .....                       | 294 |

## I. INTRODUCTION

Since he was elected, President Donald Trump and his agency heads have made bold promises to roll back agency regulations.<sup>1</sup> President Trump has promised to “cancel job killing regulations.”<sup>2</sup> The head of the Environmental Protection Agency (EPA), Scott Pruitt, has similarly promised “an ‘aggressive’ agenda of regulatory rollbacks.”<sup>3</sup> This push had its first successes in Congress.<sup>4</sup> Congress coordinated with President Trump to kill four environmental rules using the Congressional Review Act during the early months of President Trump’s presidency.<sup>5</sup> Congress repealed a substantial number of non-environmental rules as well.<sup>6</sup>

The administration has also focused its attention on the regulatory process for repealing or suspending regulations.<sup>7</sup> In March, President Trump issued an Executive Order on Promoting Energy Independence and Economic Growth, which requires all agencies to review existing regulations and other agency actions and provide recommendations to “alleviate or eliminate aspects of agency actions that burden domestic energy production.”<sup>8</sup> The Executive Order directed all agencies to “suspend, revise, or rescind, or publish for notice and comment proposed

1. Priya Krishnakummar, *The First 100 Days: Tracking President Trump’s Campaign Promises*, L.A. TIMES (Apr. 26, 2017), <http://www.latimes.com/projects/la-na-pol-trump-100-days-promises>.

2. Dan Boyce, *Trump Targets EPA and Obama Climate Change Regulations*, INSIDE ENERGY (Mar. 29, 2017), <http://insideenergy.org/2017/03/29/trump-targets-epa-and-obama-climate-change-regulations>. See WHITE HOUSE, PRESIDENT TRUMP’S FIRST 100 DAYS, <https://www.whitehouse.gov/100-days> (last visited Sept. 17, 2017) (“President Trump has Rolled Back Job-Killing Anti-Coal Regulations”).

3. Max Greenwood, *EPA Chief Calls for ‘Aggressive’ Rollback of Regulations at CPAC*, THE HILL (Feb. 25, 2017, 6:21 PM), <http://thehill.com/policy/energy-environment/321188-scott-pruitt-calls-for-aggressive-roll-backs-of-environmental>.

4. Juliet Eilperin, *Trump Undertakes Most Ambitious Regulatory Rollback Since Reagan*, WASH. POST (Feb. 12, 2017), [https://www.washingtonpost.com/politics/trump-undertakes-most-ambitious-regulatory-roll-back-since-reagan/2017/02/12/0337b1f0-efb4-11e6-9662-6eedf1627882\\_story.html?utm\\_term=.c7b49f065c2e](https://www.washingtonpost.com/politics/trump-undertakes-most-ambitious-regulatory-roll-back-since-reagan/2017/02/12/0337b1f0-efb4-11e6-9662-6eedf1627882_story.html?utm_term=.c7b49f065c2e). See Lydia Wheeler, *Window Closing for Congress to Back Obama-era Regulations*, THE HILL (Apr. 1, 2017, 1:36 PM), <http://thehill.com/regulation/326812-window-closing-for-congress-to-roll-back-obama-era-regulations>.

5. See H.R.J. Res. 41, 115th Cong. (2017) (enacted) (disapproving “Disclosure of Payments by Resource Extraction Issuers” rule finalized by the Securities and Exchange Commission); H.R.J. Res. 69, 115th Cong. (2017) (enacted) (disapproving the rule finalized by the Department of the Interior, relating to non-subsistence takings of wildlife and public participation procedures related to the National Wildlife Refuges in Alaska); H.R.J. Res. 38, 115th Cong. (2017) (enacted) (disapproving the Department of the Interior’s Stream Protection Rule); H.R.J. Res. 44, 115th Cong. (2017) (enacted) (disapproving Interior’s regulation updating procedures regarding land use plans pursuant to the Federal Land Policy and Management Act).

6. See Brian Naylor, *Republicans Are Using An Obscure Law To Repeal Some Obama-Era Regulations*, NPR POLITICS (Apr. 9, 2017, 7:00 AM), <http://www.npr.org/2017/04/09/523064408/republicans-are-using-an-obscure-law-to-repeal-some-obama-era-regulations>.

7. Thomas Perry, *The Trump Administration’s Regulatory Agenda is Taking Shape*, MARTEN LAW (Aug. 14, 2017), <http://www.martenlaw.com/newsletter/20170814-trump-administration-regulatory-agenda>.

8. Exec. Order No. 13,783, 82 Fed. Reg. 16,093, 16,094 § 2(d) (Mar. 28, 2017).

rules suspending, revising, or rescinding” any regulations that burden energy production “as soon as practicable” and “as appropriate and consistent with law.”<sup>9</sup> In addition, under President Trump’s Executive Order 13,777 on Reducing Regulation, agencies have been seeking broadly to evaluate all existing regulations and to identify regulations for “repeal, replacement or modification.”<sup>10</sup> In response to these Executive Orders, agencies have begun the process of reconsidering several rules.<sup>11</sup>

In the area of environmental and energy regulations, several prominent rules have been targeted, including:

- The EPA new source performance standards governing methane emissions from new and modified sources under section 111(b) of the Clean Air Act;<sup>12</sup>
- EPA and the Department of the Army’s rule defining the “waters of the United States;”<sup>13</sup>
- EPA’s landfill air rules;<sup>14</sup>
- EPA’s Clean Power Plan and new source performance standards for carbon dioxide under section 111(b);<sup>15</sup>
- The Bureau of Land Management’s waste prevention rule for oil and gas production on federal land;<sup>16</sup>
- The Department of the Interior’s reform to its coal valuation rules for coal, oil, and gas production on federal land;<sup>17</sup> and

9. *Id.* at §3(d).

10. Exec. Order No. 13,777, 82 Fed. Reg. 12,285, 12,286 (Feb. 24, 2017); Exec. Order No. 13,771, 82 Fed. Reg. 9,339, 9,339 (Jan. 30, 2017).

11. See Institute for Policy Integrity: N.Y. Univ. Sch. of Law, *Public Comments on Regulatory Review (HUD, MCSAC, FMC, NOAA, Coast Guard)*, PROJECT UPDATES (Jul. 7, 2017), <http://policyintegrity.org/what-we-do/update/public-comments-on-regulatory-review-hud-mcsac-fmc-noaa-coast-guard>.

12. Proposed Rule, Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources: Stay of Certain Requirements, 82 Fed. Reg. 27,645, 27,646 (2017) (to be codified at 40 C.F.R. pt. 60).

13. Proposed Rule, Definition of “Waters of the United States”—Recodification of Pre-Existing Rules, 82 Fed. Reg. 34,899, 34,900 (2017) (to be codified at 33 C.F.R. pt. 328).

14. Stay, Stay of Standards of Performance for Municipal Solid Waste Landfills and Emission Guidelines and Compliance Times for Municipal Solid Waste Landfills, 82 Fed. Reg. 24,878, 24,878 (2017) (to be codified at 40 C.F.R. pt. 60).

15. *Repeal of Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units*, 82 Fed. Reg. 48,035 (proposed Oct 16, 2017); see also 82 Fed. Reg. 16,330, 16,330-31 (announcing that the agency was reviewing the Clean Power Plan, and would, “if appropriate,” “initiate proceedings to suspend, revise or rescind the rule”).

16. Notification, Waste Prevention, Production Subject to Royalties, and Resource Conservation; Postponement of Certain Compliance Dates, 82 Fed. Reg. 27,430, 27,430 (2017) (to be codified at 43 C.F.R. pt. 3170).

17. Notification, Postponement of Effectiveness of the Consolidated Federal Oil & Gas and Federal & Indian Coal Valuation Reform 2017 Valuation Rule, 82 Fed. Reg. 11,823, 11,823 (2017) (to be codified at 30 C.F.R. pts. 1202, 1206); Repeal of Consolidated Federal Oil & Gas and Federal & Indian Coal Valuation Reform, 82 Fed. Reg. 36,934 (2017) (to be codified at 30 C.F.R. pts. 1202, 1206).

- Several energy efficiency standards issued by the Department of Energy (DOE).<sup>18</sup>

The Trump administration has also withdrawn executive guidance documents.<sup>19</sup> For example, President Trump withdrew guidance issued by the Council on Environmental Quality on consideration of greenhouse gas emissions in reviews under the National Environmental Policy Act (NEPA).<sup>20</sup> The administration also withdrew technical guidance documents issued by the Interagency Working Group on the Social Cost of Greenhouse Gases.<sup>21</sup>

In claiming authority to revise these rules, agencies have invoked their “inherent authority to reconsider past decisions and to rescind or revise a decision to the extent permitted by law when supported by a reasoned explanation.”<sup>22</sup> But while the administration has more flexibility in withdrawing or dismantling guidance documents,<sup>23</sup> well-established principles of administrative law govern an agency’s attempt to undo final rules and regulations issued under a prior presidential administration. The principles provide a predictable set of constraints and an important check on agency overreach, waste, and abuse.<sup>24</sup> Indeed, having a predictable set of rules to govern this process, regardless of political party, is a crucial feature of a functioning and stable democracy.<sup>25</sup> This is not to say that agencies

18. Sabin Center for Climate Change Law, *DOE Postpones Five Energy Efficiency and Conservation Standards*, COLUM. L. SCH. (Feb. 2, 2017), <http://columbiaclimatelaw.com/climate-deregulation-tracker/doe-postpones-five-energy-efficiency-and-conservation-standards>.

19. Michael Kuser, *Trump Brings Uncertainty to ISO-NE, Regulators*, RTO INSIDER (June 19, 2017), <https://www.rtoinsider.com/trump-iso-ne-epa-greenhouse-gas-emissions-44521>.

20. Notice, *Withdrawal of Final Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in National Environmental Policy Act Reviews*, 82 Fed. Reg. 16,576, 16,576 (Apr. 5, 2017). This leaves agencies without any guidance on how to figure out the impact of greenhouse gas emissions and exposes them to liability for either failing to consider the effects of greenhouse gases or failing to follow best practices when doing so.

21. Exec. Order. No. 13,783, 82 Fed. Reg. 16,093, 16,095-96 § 5(b) (Mar. 28, 2017).

22. Announcement of Review, *Review of the Standards of Performance for Greenhouse Gas Emissions from New, Modified, and Reconstructed Stationary Sources: Electric Generating Units*, 82 Fed. Reg. 16,330, 16,331 (2017) (to be codified at 40 C.F.R. pt. 60).

23. See 5 U.S.C. § 553(b) (2012) (explaining that the APA’s rulemaking procedures do not apply to “general statements of policy”); see also *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (giving heightened deference to the Secretary of Labor’s interpretation of his own regulations); David H. Becker, *Changing Direction in Administrative Agency Rulemaking*, ENVIRONS ENVTL. L. & POL’Y J. 67 (2006), <https://environs.law.ucdavis.edu/volumes/30/1/becker.pdf> (“Although a change in administration may properly influence agency rulemaking, courts have continued to engage in, and commentators to advocate, meaningful judicial review of agency changes of direction in rulemaking”).

24. Eric Berger, *Individual Rights, Judicial Deference, And Administrative Law Norms In Constitutional Decision Making*, B.U. L. REV. 91:6 2029, 2056-58 (Dec. 2011), <http://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1156&context=lawfacpub>.

25. Adam Przeworski, *Democracy and the Market* 19, 26, 51, <https://www.cambridge.org/core/books/democracy-and-the-market/8BB2B73D2DBB302B681B61D622F9B4BB> (explaining that a stable democracy is one where “conflicts are processed through democratic institutions” because this provides the losing party with hope that eventually things might turn around and that she will be able to operate within the same framework if and when she regains power). See Noam Lupu & Rachel Beatty Riedl, *Political Parties and Uncertainty in Developing Democracies*, 46(11) COMP. POL. STUD. 1339, 1347 (2012), <http://journals.sagepub.com/doi/pdf/10.1177/0010414012453445> (explaining that uncertainty about the rules of the game can negatively affect democratic processes).

cannot undo regulations.<sup>26</sup> These principles also allow agencies to undo rules, as long as they act within the law.<sup>27</sup>

Though the precise limits depend on what steps the administration takes to change or delay a given rule, generally speaking, the same rules that apply to promulgating rules apply to repealing them under section 706 of the Administrative Procedure Act (APA).<sup>28</sup> But if an agency seeks to disregard facts underlying the original rule or disturb longstanding reliance interests, then the agency will need to satisfy additional requirements, including providing “a more detailed justification than what would suffice for new policy created on a blank slate.”<sup>29</sup> In this way, the APA principles help reduce regulatory uncertainty as well as reduce the risk that governmental agencies will waste enormous resources designing a regulatory program and then canceling the program on a whim.<sup>30</sup>

This article will explore these limits on an incoming president’s ability to unravel a prior administration’s rules, which is particularly germane given President Trump’s calls for deregulation. The article will focus in particular on rules in the climate and energy context. This piece will also focus on final rules promulgated through notice and comment rulemaking, not on guidance documents or non-final rules could be easier to rescind or delay, depending on the statutory context. Part I will discuss procedural limits on repeals, including (1) the requirement that the agency undertake notice and comment rulemaking to modify or suspend a rule promulgated through notice and comment, and (2) the requirement that an agency provide a reasoned explanation to change its policy approach or factual findings. Part II will discuss the statutory restrictions on undoing a promulgated rule. Part III will describe how the agency’s analysis of the costs and benefits of the repeal must not be arbitrary and capricious. We conclude by summing up and offering a word to the wise, which should be self-evident but is worthy of sustained attention because of the Trump administration’s actions: even an aggressive agenda to “cancel” and roll back regulations must comply with the law.

## II. ADMINISTRATIVE PROCEDURE ACT REQUIREMENTS

In 1946, President Truman signed the APA, which was passed to bring “reasonable uniformity and fairness” to the administrative state, “without at the same time interfering unduly with the efficient and economical operation of the Government.”<sup>31</sup> The APA contains a set of neutral rules that govern agency decision-making, regardless of political party.<sup>32</sup> Those rules afford executive agencies a fair amount of discretion to resolve technical and fact-specific questions, but they

---

26. See generally, e.g., *Sprint Corp. v. FCC*, 315 F.3d 369, 373 (D.C. Cir. 2003).

27. *Id.* at 373-74.

28. See 5 U.S.C. § 706; GA. CODE ANN. § 50-13-4 (2017).

29. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) [hereinafter *Fox*]; see also *Nat’l Ass’n of Home Builders v. EPA*, 682 F.3d 1032, 1037 (D.C. Cir. 2012) [hereinafter *Home Builders*].

30. *Fox*, 556 U.S. at 542 (Stevens, J., dissenting) (both the APA and the rule of law “favor stability over administrative whim”).

31. ATTORNEY GENERAL’S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT Appendix B (1947).

32. *Id.*

also require agencies to comply with several uniform procedural rules when resolving those questions.<sup>33</sup> For example, agencies must ensure that the public is “currently informed of their organization, procedures, and rules” and has an opportunity to participate in the rulemaking process.<sup>34</sup> In addition, agencies must not act in an arbitrary and capricious manner<sup>35</sup> and as part of that requirement, agencies must provide a “reasoned explanation” for their decisions.<sup>36</sup> These rules all apply to rollbacks just like they apply to initial regulations.

#### A. Notice and Comment Requirements for Repeals

Under the APA, there are three important steps to issuing a rule through notice and comment rulemaking. First, agencies must provide the public with “general notice of proposed rulemaking”<sup>37</sup> in enough detail to afford the public with a meaningful opportunity to comment on a proposed rulemaking.<sup>38</sup> In complying with this requirement, the agency must “make its views known . . . in a concrete and focused form so as to make criticism or formulation of alternatives possible,”<sup>39</sup> and any final rule must be a “logical outgrowth” from the proposal so as not to unduly prejudice the public’s ability to comment on the agency’s ultimate choices.<sup>40</sup> Second, the agency must allow “interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation.”<sup>41</sup>

Third, in any final rule, the agency must respond to “each of the significant comments, criticisms, and new data submitted in written or oral presentations during the comment period.”<sup>42</sup> The detail required in the explanation depends in part

33. *Id.*

34. *Id.* at 9.

35. ATTORNEY GENERAL’S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 108 (1947).

36. *Fox*, 556 U.S. at 515.

37. 5 U.S.C. § 553(b) (2017).

38. *Prometheus Radio Project v. FCC*, 652 F.3d 431, 453 (3rd Cir. 2011).

39. *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 36 (D.C. Cir. 1977).

40. *United States Telecom Ass’n v. Fed. Comm’n Comm’n*, 825 F.3d 674, 700 (D.C. Cir. 2016) (an agency “satisfies the logical outgrowth test if it” makes clear that the agency is “contemplating a particular change”); *Allina Health Servs. v. Sebelius*, 746 F.3d 1102, 1107 (D.C. Cir. 2014) (“A final rule is a logical outgrowth if affected parties should have anticipated that the relevant modification was possible.”).

41. 5 U.S.C. § 553(c) (2017).

42. 42 U.S.C. § 7607(d)(6) (2017). The APA rules are mirrored in several substantive statutes as well. Generally speaking, “failure to observe the basic APA procedures” would violate these statutes as well. *See, e.g., Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 523 (D.C. Cir. 1983). For example, under the Federal Land Policy and Management Act, the Bureau of Land Management must “allow an opportunity for public involvement” and “establish procedures” to give “the public, adequate notice and opportunity to comment upon and participate in the formulation of plans and programs relating to the management of the public lands.” 43 U.S.C. § 1712(f) (2017). *See also* 43 C.F.R. § 1610.5–5; *Klamath Siskiyou Wildlands Ctr. v. Boody*, 468 F.3d 549, 556 (9th Cir. 2006) (“if BLM wishes to change a resource management plan, it can only do so by formally amending the plan pursuant to 43 C.F.R. § 1610.5–5”). Similarly, under the Clean Air Act, EPA is exempted from complying with several notice and comment provisions of the APA. *See* 42 U.S.C. § 7607(d). But the Clean Air Act itself requires EPA to provide notice to the public of the rule, accompanied by “a statement of its basis and purpose” for a rule, including the “factual data on which the proposed rule is based,” “the methodology used in obtaining the data and in analyzing the data,” and “the major legal interpretations and policy considerations underlying the proposed rule.” 42 U.S.C. § 7607(d)(3).

on “the nature of the comments received” in response to the proposal.<sup>43</sup> An agency is not required to respond to every comment, but it must respond to “comments which, if true, raise points relevant to the agency’s decision and which, if adopted, would require a change in an agency’s proposed rule.”<sup>44</sup> “The failure to respond to comments is significant” if it “demonstrates that the agency’s decision was not based on a consideration of the relevant factors.”<sup>45</sup>

All of these steps apply to repeals. The APA “expressly contemplates that notice and an opportunity to comment will be provided prior to agency decisions to repeal a rule.”<sup>46</sup> The APA includes “repealing a rule” in the definition of “rule making” and all of the procedural rules that apply to a “rule making” apply to repeals under that provision.<sup>47</sup>

Courts have consistently rebuffed agency attempts to evade the notice and comment requirement on repeal by taking other steps, such as entering into consent decrees with the challenging party.<sup>48</sup> For example, in *Conservation Northwest v. Sherman*, environmental organizations, the Bureau of Land Management (BLM), and the Fish and Wildlife Service had entered into a consent decree resolving several alleged violations of NEPA in the Northwest Forest Plan, a land management plan governing old growth forests in the Pacific Northwest.<sup>49</sup> The consent decree contained new and detailed land management requirements to be imposed under the plan.<sup>50</sup> But the Ninth Circuit vacated the consent decree because it “allowed the [a]gencies effectively to promulgate a substantial and permanent amendment” to the land management plan “without having followed statutorily required procedures.”<sup>51</sup>

As the D.C. Circuit explained recently in a different case, an agency’s “consent is not alone a sufficient basis for us to stay or vacate a rule.”<sup>52</sup> Otherwise, “an agency could circumvent the rulemaking process through litigation concessions, thereby denying interested parties the opportunity to oppose or otherwise comment on significant changes in regulatory policy.”<sup>53</sup> Allowing an agency to “engage in rescission by concession” would render “the doctrine requiring agencies to give reasons before they rescind rules . . . a dead letter.”<sup>54</sup> Instead, the D.C.

43. *Civil Aeronautics Bd.*, 699 F.2d at 1216.

44. *Nat’l Shooting Sports Found. v. Jones*, 716 F.3d 200, 215 (D.C. Cir. 2013) (internal quotation marks omitted). *See generally* *North Carolina v. FAA*, 957 F.2d 1125 (4th Cir. 1992).

45. *Covad Commc’ns Co. v. FCC*, 450 F.3d 528, 550 (D.C. Cir. 2006).

46. *Consumer Energy Council of Am. v. FERC*, 673 F.2d 425, 446 (D.C. Cir. 1982), *aff’d*, 463 U.S. 1216 (1983) (rejecting FERC’s argument that notice and comment prior to promulgation was sufficient for revocation as well); *accord* *Nat’l Parks Conservation Ass’n v. Salazar*, 660 F. Supp. 2d 3, 5 (D.D.C. 2009).

47. 5 U.S.C. § 551(5).

48. *Conservation Nw. v. Sherman*, 715 F.3d 1181 (9th Cir. 2013).

49. *Id.* at 1188.

50. *Id.* at 1184.

51. *Sherman*, 715 F.3d at 1188. *See Salazar*, 660 F. Supp. at 3 (“granting vacatur here would allow the Federal defendants to do what they cannot do under the APA, repeal a rule without public notice and comment, without judicial consideration of the merits”).

52. *Mexichem Specialty Resins, Inc. v. EPA*, 787 F.3d 544, 557 (D.C. Cir. 2015).

53. *Id.*

54. *Id.*

Circuit will only accept a concession of error where the court agrees that the agency's concession was supported by the regulations.<sup>55</sup>

Similarly, courts have explained that even though an agency has discretion under the APA whether to formulate policy by rulemaking or adjudication, once the agency adopts a policy through notice and comment rulemaking, it can amend or repeal its rule or policy only through the same notice and comment procedure.<sup>56</sup> To allow an agency to “effectively repeal legislative rules and abandon longstanding interpretations of statutes indirectly, by adjudication,” would allow the agency to repeal a rule “without providing affected parties any opportunity to comment on the proposed changes, and without providing any significant explanation for their departure from their established views,” in violation of the governing rulemaking procedures.<sup>57</sup> Thus, “[o]nce an agency gives its regulation an interpretation, it can only change that interpretation as it would formally modify the regulation itself: through the process of notice and comment rulemaking.”<sup>58</sup>

### *B. Notice and Comment Requirements for Changing a Rule's Effective Date or Compliance Deadlines*

Notice and comment requirements also apply to suspensions.<sup>59</sup> It is well settled that an effective date is “an essential part of any rule.”<sup>60</sup> Postponing deadlines in a rule has a “substantive effect on the obligations of the owners of existing facilities and on the rights of the public.”<sup>61</sup> As such, a decision to postpone or suspend a rule is an action that is subject to the APA's notice and comment requirements, just like a repeal or any other substantive rule.<sup>62</sup> Indeed, when an agency postpones compliance deadlines, courts have recognized that such a suspension is tantamount to a revocation and should be subject to the same notice and comment requirements as a repeal under the APA.<sup>63</sup> As President Trump's Secretary of Labor recently acknowledged, the requirement that agencies seek public comment on delays “is not red tape.”<sup>64</sup> That requirement exists so “that agency

55. *Sierra Club v. EPA*, 705 F.3d 458, 465 (D.C. Cir. 2013).

56. *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974). *See Am. Fed'n of Gov't Emps. v. NLRB*, 777 F.2d 751, 759 (D.C. Cir. 1985).

57. *Am. Fed'n of Gov't Emps.*, 777 F.2d at 759.

58. *Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579, 586 (D.C. Cir. 1997). *See Env'tl. Integrity Project v. EPA*, 425 F.3d 992, 995 (D.C. Cir. 2005) (“[O]therwise, an agency could easily evade notice and comment requirements by amending a rule under the guise of reinterpreting it”); *Alaska Prof'l Hunters Ass'n, Inc. v. FAA*, 177 F.3d 1030, 1034 (D.C. Cir. 1999) (“When an agency has given its regulation a definitive interpretation, and later significantly revises that interpretation, the agency has in effect amended its rule, something it may not accomplish without notice and comment”).

59. *NRDC v. EPA*, 683 F.2d at 768.

60. *See id.* at 762; *Env'tl Def. Fund, Inc. v. Gorsuch*, 713 F.2d 802, 818 (D.C. Cir. 1983) [hereinafter *Env'tl Def. Fund, Inc.*]. *See also* Lisa Heinzerling, *The Legal Problems (So Far) of Trump's Deregulatory Binge* at I.A., HARV. L. & POL'Y REV., forthcoming [hereinafter Heinzerling].

61. *Env'tl Def. Fund, Inc.*, 713 F.2d at 815-816.

62. *See NRDC*, 683 F.2d at 762; *Env'tl Def. Fund, Inc.*, 713 F.2d at 818.

63. *NRDC*, 683 F.2d at 763; *Pub. Citizen v. Steed*, 733 F.2d 93, 98 (D.C. Cir. 1984); *Sierra Club v. Jackson*, 833 F. Supp. 2d 11, 27 (D.D.C. 2012).

64. Alexander Acosta, *Deregulators Must Follow the Law, So Regulators Will Too*, WALL STREET JOURNAL (May 23, 2017), <https://www.looktowink.com/2017/05/deregulators-must-follow-law-regulators-will>.



heads do not act on whims, but rather only after considering the views of all Americans.”<sup>65</sup>

Decisions postponing rules have long been reviewed by the courts as final agency actions.<sup>66</sup> And in a recent D.C. Circuit opinion, the court confirmed, over a dissenting opinion, that an agency’s decision to suspend compliance deadlines is a reviewable final agency action.<sup>67</sup> The court explained that a decision to suspend deadlines is a final agency action because it is “tantamount to amending or revoking a rule” and noted that the decision “affects regulated parties’ rights or obligations” because it “relieves regulated parties of liability they would otherwise face.”<sup>68</sup>

Several agencies under President Trump have been issuing suspensions under 5 U.S.C. § 705, which allows agencies to “postpone the effective date of action taken by it, pending judicial review” if an agency finds that “justice so requires” the postponement.<sup>69</sup> Agencies have taken the position that this statutory provision authorizes them to postpone the rules without notice and comment, because section 705 does not mention the APA’s notice and comment requirements.<sup>70</sup> But because the section 705 suspensions operated as effective repeals, courts have rejected these attempts to circumvent the APA’s notice and comment requirements.<sup>71</sup>

“Vacatur is the standard remedy for a violation of the APA,” such as the notice and comment requirements.<sup>72</sup> For example, a recent decision in *California v. U.S. Bureau of Land Management*, the court vacated a section 705 suspension finding (1) that the violation was serious and (2) that vacatur would not be unduly disruptive because it simply required companies to comply with a valid and enforceable regulation unless and until the agency decided to repeal the regulation.<sup>73</sup> The court explained that the alternative of “keeping the unlawful regulation in place” was not appropriate because it “could be viewed as a free pass for agencies to exceed their statutory authority and ignore their legal obligation under the APA, making a mockery of the statute.”<sup>74</sup>

Similarly, in *Action on Smoking & Health v. Civil Aeronautics Board*, the D.C. Circuit ordered the agency to republish the prior regulation, “until such provision may be amended or revoked by proper rulemaking proceedings made after new notice and comment procedures in compliance with the requirements of the

65. *Id.*

66. *See, e.g., Public Citizen*, 733 F.2d at 98; *Env’tl Def. Fund, Inc.*, 716 F.2d at 921; *Council of the Southern Mountains, Inc. v. Donovan*, 653 F.2d 573, 579 n. 26 (D.C. Cir. 1981).

67. *Clean Air Council v. Pruitt*, 862 F.3d 1, 6 (D.C. Cir. 2017) [hereinafter *Clean Air Council*].

68. *Id.* at 6-7. *See also* *Heinzerling* at III.A (explaining that delays are substantive, not procedural, rules).

69. 5 U.S.C. § 705.

70. *See, e.g.,* Defendants’ Opp. to Plaintiffs’ Motions for Summary Judgment at 21-23, *California v. Bureau of Land Management* (No. 17-3885) (N.D. Cal.), ECF No. 52.

71. *California v. Bureau of Land Management*, No. 17-03804, 2017 WL 4416409, at \*7 (N.D. Cal. Oct. 4, 2017); *Becerra v. Dep’t of Interior*, No. 17-02376, 2017 WL 3891678, at \*1 (N.D. Cal. Aug. 30, 2017).

72. *California*, 2017 WL 4416409, at \*13; *see also* *Action on Smoking & Health v. Civil Aeronautics Bd.*, 713 F.2d 795, 797 (D.C. Cir. 1983) [hereinafter *Civil Aeronautics Bd.*].

73. *California*, 2017 WL 4416409, at \*13-\*14

74. *Id.* at \*14.

Act.”<sup>75</sup> In fact, courts have reinstated the regulation’s original deadlines, no matter how long it took to reach a result in the case.<sup>76</sup> For example, in *NRDC v. EPA*, the Third Circuit reinstated the original deadlines for a regulation restricting the discharge of toxic pollutants under the Clean Water Act a year after those deadlines had passed.<sup>77</sup>

In one recent case, a court declined to vacate an illegal suspension, but only because the agency had already issued a rule repealing the suspended regulation.<sup>78</sup> The court declared the suspension illegal, however, and, noting that litigation over the repeal would likely be commenced, explained that the “issue of vacatur of the postponement” could be addressed if “there comes a time in the future when the Repeal Rule itself is vacated.”<sup>79</sup> In sum, there is no wiggle room in whether agencies must comply with notice and comment requirements.<sup>80</sup>

### C. Reasoned Explanation for Changing Course

The APA also requires courts to “hold unlawful and set aside agency action, findings, and conclusions found to be [among other things] . . . arbitrary [or] capricious.”<sup>81</sup> Under that arbitrary and capricious standard, agencies “must examine the relevant data and articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’”<sup>82</sup>

Under this “reasoned explanation” requirement, in order to repeal or suspend a regulation, an agency must (1) “display awareness that it *is* changing position,” (2) show that “the new policy is permissible under the statute,” and (3) show that there are good reasons for the new policy.<sup>83</sup> This requirement to provide reasons applies to suspensions as well as repeals.<sup>84</sup> And this requirement applies whether or not the new policy has been driven by “the inauguration of a new President.”<sup>85</sup>

Implicit in this standard is the requirement that agencies provide a justification for changing or suspending a rule at the time that the rule is changed, not after

---

75. *Id.*; *Action on Smoking & Health*, 713 F.2d at 798-80202.

76. *NRDC v. EPA*, 683 F.2d 752, 768-69 (3d Cir. 1982).

77. *Id.* at 763.

78. *Becerra*, 2017 WL 3891678, at \*12.

79. *Id.*

80. *See, e.g., NRDC*, 683 F.2d at 763.

81. *Fox*, 556 U.S. at 514-15; *accord Nat’l Ass’n of Home Builders*, 682 F.3d at 1038.

82. *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) [hereinafter *State Farm*].

83. *Fox*, 556 U.S. at 514-15.

84. *See Pub. Citizen*, 733 F.2d at 98 (quoting *State Farm*, 463 U.S. at 48); *Sierra Club*, 833 F. Supp. 2d at 18.

85. *Nat’l Ass’n of Home Builders v. E.P.A.*, 682 F.3d 1032, 1043 (D.C. Cir. 2012) (explaining that the agency must operate within the bounds established by Congress). Indeed, given that a large percentage of judges are appointed by prior administrations it would behoove a new administration to ensure that its new policies can be defended as minimally rational from the perspective of the other party. *See generally* Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 *YALE L.J.* 453 (1989).

the fact.<sup>86</sup> For example, even if an agency is reconsidering a rule, the agency must provide reasons for any suspension at the time of the suspension—when the public will feel the impact—not after the completion of reconsideration.<sup>87</sup> As the D.C. Circuit has explained, “[w]ithout showing that the old policy is unreasonable, for [an agency] to say that no policy is better than the old policy solely because a new policy *might* be put into place in the indefinite future is as silly as it sounds.”<sup>88</sup>

While agencies usually are entitled to *Chevron* deference when interpreting a statute and issuing regulations, the Supreme Court recently explained in *Encino Motorcars, LLC v. Navarro* that the “reasoned explanation” requirement is a procedural requirement and that a regulation which fails to comply with this requirement “is itself unlawful and receives no *Chevron* deference.”<sup>89</sup> In *Encino Motorcars*, the Department of Labor had failed to provide an adequate explanation for a new regulation issued under the Fair Labor Standards Act, which required automobile dealerships to pay overtime wages to service advisors (salespeople who assist customers with purchasing repairs).<sup>90</sup> As the Court explained, “it is not the role of the courts to speculate on reasons that might have supported an agency’s decision.”<sup>91</sup> Because the regulation “gave almost no reasons at all,” the Court declined to afford the agency *Chevron* deference and vacated the regulation.<sup>92</sup>

#### *D. Unique Features of the Arbitrary and Capricious Standard that Apply in the Context of Repeals and Suspensions*

Though the “reasoned explanation” requirement generally requires the same amount of analysis regardless of whether the agency is issuing a rule initially or repealing it, there are three specific areas that agencies must address on repeal, which are unique to this context: (1) the alternatives adopted in the previous rule, (2) facts underlying the previous rule, and (3) reliance interests.<sup>93</sup>

##### 1. Consideration of Alternatives Presented in the Original Rulemaking Record

In order to repeal a regulation, an agency must consider the options adopted in the existing regulation and explain why it has now chosen to reject those options.<sup>94</sup> For example, in the well-known *State Farm* case, the Supreme Court held that the rescission of a rule mandating passive car safety restraints, such as airbags, was arbitrary and capricious because the National Highway Traffic and Safety

---

86. *State Farm*, 463 U.S. at 52 (“one aspect of that explanation would be a justification for rescinding the regulation before engaging in a search for further evidence”); *Pub. Citizen*, 733 F.2d at 98 (agency’s decision to suspend its program while it “further studied” an alleged problem with the program was arbitrary and capricious).

87. *Pub. Citizen*, 733 F.2d at 102.

88. *Pub. Citizen*, 733 F.2d at 102.

89. *Encino Motorcars, LLC v. Navarro*, 136 S.Ct. 2117, 2126 (2016).

90. *Id.* at 2127.

91. *Id.*

92. *Id.*

93. *Fox*, 556 U.S. at 515.

94. *State Farm*, 463 U.S. at 42.

Administration (NHTSA) failed to explain why it decided to repeal the requirement that manufacturers install airbags or nondetachable belts.<sup>95</sup> In the Court's view, the agency was required to explain its decision because the agency had previously made the judgment "that airbags are an effective and cost-beneficial life-saving technology."<sup>96</sup>

Numerous additional examples exist of courts striking down repeals of rules because the agency failed to adequately explain the departure from an earlier regulatory approach.<sup>97</sup> For example, in *Public Citizen v. Steed*, NHTSA had issued a regulation setting uniform tire quality grading standards, in order to better inform customers of the minimum treadwear performance for each tire.<sup>98</sup> In 1983, after President Ronald Reagan's election, the agency suspended the portion of the regulation that addressed treadwear, after going through a notice and comment rulemaking.<sup>99</sup> In the suspension, the agency asserted that "variability in grade assignment practices by the tire manufacturers" had caused the standards to be misleading.<sup>100</sup> The D.C. Circuit struck down the suspension finding that NHTSA "failed to explain why alternatives, which the rulemaking record indicate[d] were available to the agency, could not correct many of the variability problems that NHTSA had identified."<sup>101</sup> Likewise, in *International Ladies' Garment Workers' Union v. Donovan*, the D.C. Circuit held that the Department of Labor failed to consider alternatives to a repeal, which were "raised in [the] original notice and the comments."<sup>102</sup>

These principles may come into play in litigation over current rollbacks.<sup>103</sup> For example, the Department of the Interior has repealed a 2016 rule that had reformed royalty rules governing coal, oil, and gas mining on federal land.<sup>104</sup> Prior to the reform, companies had been taking advantage of an antiquated "benchmark" system to pay royalties only on lower domestic sales prices obtained through captive transactions rather than on the real (market) price obtained through the ultimate arm's length sale.<sup>105</sup> The reform promised \$3.61 million in cost savings per

---

95. *Id.* at 40.

96. *Id.* at 51.

97. See generally *Pub. Citizen*, 733 F.2d 93 (D.C. Cir. 1984), *B.F. Goodrich Co. v. Dep't of Transp.*, 592 F.2d 322 (6th Cir. 1979) [hereinafter *B.F. Goodrich Co.*].

98. See *Pub. Citizen* at 94; see also *B.F. Goodrich Co.* (upholding standards).

99. *Pub. Citizen*, 733 F.2d at 96.

100. *Id.* at 99.

101. *Id.* at 100. See also *Office of Commc'n of United Church of Christ v. FCC*, 707 F.2d 1413, 1441-1442 (D.C. Cir. 1983); *Civil Aeronautics Bd.*, 699 F.2d at 1217-19; *Wheaton Van Lines, Inc. v. ICC*, 671 F.2d 520 (1982).

102. *Int'l Ladies' Garment Workers' Union v. Donovan*, 722 F.2d 795, 816 (D.C. Cir. 1983).

103. Final Rule, Repeal of Consolidated Federal Oil & Gas and Federal & Indian Coal Valuation Reform, 82 Fed. Reg. 36,934 (2017).

104. *Id.*

105. See generally HEADWATERS ECONOMICS, AN ASSESSMENT OF U.S. FEDERAL COAL ROYALTIES (2015); see also Proposed Rule, Consolidated Federal Oil & Gas and Federal & Indian Coal Valuation Reform, 80 Fed. Reg. 608, 617, 621, 628 (Jan. 6, 2015) (to be codified at 30 C.F.R. pts. 1202, 1206).

year by eliminating the cumbersome benchmarks system and an increase in royalties by an estimated \$78.39 million per year.<sup>106</sup>

In the repeal, Interior explained that the reform needed to be repealed because it would “increase the costs of compliance” and had other substantive defects.<sup>107</sup> Interior did not explain, however, why it could not maintain the reform while it fixed the defects. Nor did Interior provide any details to show how a regulation—which it previously found would decrease administrative costs and raise royalties—would instead increase costs of compliance.<sup>108</sup>

As another example, EPA has proposed to repeal the Clean Power Plan—EPA’s regulations restricting carbon dioxide emissions from power plants—without offering a replacement plan.<sup>109</sup> In the repeal proposal, EPA has asserted that the Clean Power Plan’s reliance on so-called generation-shifting to set the emissions guidelines exceeded EPA’s authority under the statute.<sup>110</sup> But it is indisputable that EPA has a statutory duty to regulate greenhouse gas emissions from power plants: The Supreme Court confirmed in *Massachusetts v. EPA* that the Clean Air Act covers air pollutants such as greenhouse gases.<sup>111</sup> And in *American Electric Power Co.*, the Court explained that “the Clean Air Act directs EPA to establish emissions standards for categories of stationary sources” that in EPA’s judgment, cause or contribute “significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare.”<sup>112</sup> EPA has considered the issue and found that greenhouse gases endanger human health and welfare.<sup>113</sup> The D.C. Circuit upheld that determination, and the Supreme Court declined to review the issue.<sup>114</sup>

So even if EPA’s justification for repealing the Clean Power Plan was reasonable—and EPA’s reasons themselves will receive scrutiny, see *infra* part III—EPA would need to explain why one of the alternatives “which the rulemaking record indicates were available to the agency” could not have been adopted instead.<sup>115</sup> For example, in the original rulemaking EPA considered (1) increases in energy efficiency at power plants (“heat rate” improvements); (2) use of natural

106. Final Rule, Consolidated Federal Oil & Gas and Federal & Indian Coal Valuation Reform, 81 Fed. Reg. 43,338, at 43,359 (Jul. 1, 2016) (to be codified at 30 C.F.R. pts. 1202, 1206).

107. 82 Fed. Reg. 36,934 at 36,939.

108. *Id.*; See also Proposed Rule, Repeal of Consolidated Federal Oil & Gas and Federal & Indian Coal Valuation Reform, 82 Fed. Reg. 16,323, 16,323 (2017) (to be codified at 30 C.F.R. pts. 1202, 1206) (proposing to repeal the rule without providing any reasons other than the agency’s desire to start the reconsideration process).

109. Repeal of Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 82 Fed. Reg. 48,035 (proposed Oct 16, 2017); see also Announcement of Review, Review of the Clean Power Plan, 82 Fed. Reg. 16,329 (Apr. 4, 2017).

110. 82 Fed. Reg. at 48,036.

111. See generally *Massachusetts*, 549 U.S. at 527.

112. *Id.* (quoting § 7411(b)(1)(A)).

113. Final Rule, Endangerment and Cause or Contribute Findings for Greenhouse Gases, 74 Fed. Reg. 66,496 (Dec. 15, 2009) (to be codified at 40 C.F.R. pt. 1) (the original endangerment finding).

114. *Coal. for Responsible Regulation, Inc. v. EPA*, 684 F.3d 102, 122 (D.C. Cir. 2012), *aff’d in part, rev’d in part sub nom.*; *Util. Air Regulatory Grp. v. EPA*, 134 S.Ct. 2427 (2014); *Coal. for Responsible Regulation, Inc. v. EPA*, 134 S.Ct. 468 (2013).

115. *Pub. Citizen*, 733 F.2d at 99-100.

gas alongside coal to fuel plants (“co-firing”); (3) demand-side measures like energy efficiency programs; or (4) some combination of these and other options as options for both setting the emissions limit and compliance options for industry.<sup>116</sup> While the proposed repeal specifies that EPA is “not taking comment on on-site efficiency measures with this proposal,”<sup>117</sup> any final repeal that fails to address why EPA could not keep the limits in place by adopting one of these bases for setting the emissions limit, could risk a substantial legal challenge.

## 2. Consideration of Facts Underlying the Original Regulation

An agency also cannot disregard the “facts and circumstances that underlay or were engendered by the prior policy” without providing a reasoned explanation for doing so.<sup>118</sup> As the Court explained in *FCC v. Fox*, “when . . . [a] new policy rests upon factual findings that contradict those which underlay its prior policy” the agency must provide “a more detailed justification than what would suffice for a new policy created on a blank slate.”<sup>119</sup> Justice Kennedy elaborated on this point in his concurrence explaining that “[a]n agency cannot simply disregard contrary or inconvenient factual determinations that it made in the past, any more than it can ignore inconvenient facts when it writes on a blank slate.”<sup>120</sup>

Examples abound of courts refusing to let agencies disregard factual findings when attempting to repeal a rule.<sup>121</sup> In *Organized Village of Kake*, for example, the Ninth Circuit found that the George W. Bush administration’s attempt to repeal the a land management rule violated the APA because the agency failed to explain why an action that was previously found to pose “a prohibitive risk to the . . . environment only two years before now poses merely a ‘minor’ one.”<sup>122</sup> Likewise, in *Humane Society of the United States v. Locke*, the Ninth Circuit held that, when the National Marine Fisheries Service departed from an earlier finding regarding the predation of sea lions on salmon, “it was incumbent on the agency to offer a ‘satisfactory explanation’ for its decision in light of the earlier findings.”<sup>123</sup> The court explained that the agency “cannot avoid its duty to confront these inconsistencies by blinding itself to them.”<sup>124</sup>

Reportedly, EPA Administrator Scott Pruitt is considering whether to withdraw EPA’s Endangerment Finding.<sup>125</sup> But even some industry advocates have

116. 80 Fed. Reg. at 64,662-01, 64,709, 64,727-28, 64,816 (2015).

117. 82 Fed. Reg. at 48,039 n.5.

118. *Fox*, 556 U.S. at 516.

119. *Id.*; *See Home Builders*, 682 F.3d at 1037.

120. *Fox*, 556 U.S. at 537 (Kennedy, J., concurring).

121. *Kake*, 795 F.3d 956, 969; *Humane Society of the United States v. Locke*, 626 F.3d 1040, 1051 (9th Cir. 2010).

122. *Kake*, 795 F.3d at 969.

123. *Humane Society*, 626 F.3d at 1051.

124. *Id.*; *see also* *Mingo Logan Coal Co. v. EPA*, 829 F.3d 710, 727 (D.C. Cir. 2016) (holding that the agency “adequately explained how new information arising after the . . . permit issued informed its conclusion that the project would result in ‘unacceptable adverse effect[s]’ to wildlife”).

125. Emily Holden, *Pruitt Will Launch Program to ‘Critique’ Climate Science*, CLIMATEWIRE (June 30, 2017), <https://www.eenews.net/stories/1060056858>.

cautioned against such an approach because EPA would need to devote vast resources to undoing the factual finding that greenhouse gases endanger human health and welfare and such an effort is unlikely to be upheld in court.<sup>126</sup> The endangerment finding is based on a copious number of scientific studies, which support the determination that global warming caused by greenhouse-gas emissions results in public health harms, such as more premature deaths from heat waves and more respiratory illnesses from smog, as well as many other adverse welfare effects.<sup>127</sup> More recently, in the Clean Power Plan, EPA summarized recent scientific assessments and concluded that climate change is harming every region of the country.<sup>128</sup>

In any repeal of the endangerment finding, the agency would need to provide a more detailed explanation for why it believes it should disregard the studies and information in those prior findings than it would have with a finding made on a clean slate.<sup>129</sup> EPA recognized back in 2009 that any new assessment of the science underlying the endangerment finding would “have to give proper weight” to the reports and studies that EPA looked at in the original endangerment finding.<sup>130</sup> It would be extremely hard to walk back those statements and to ignore those studies now.<sup>131</sup> Without a finding that the facts had so changed as to justify the new policy, it is unlikely that a decision to ignore that evidence would be upheld.<sup>132</sup>

In a 1985 law review article, written before he was on the bench, Judge Merrick Garland explained that the Court’s decision in *State Farm* can be understood as a substantive rejection of the agency’s decision not to mandate nondetachable

---

126. Holden, *supra* note 155.

127. 74 Fed. Reg. at 66,497-98, 66,525, 66,533. See TECHNICAL SUPPORT DOCUMENT FOR ENDANGERMENT FINDING, [https://www.epa.gov/sites/production/files/2016-08/documents/endangerment\\_tsd.pdf](https://www.epa.gov/sites/production/files/2016-08/documents/endangerment_tsd.pdf) (last visited Sept. 29, 2017).

128. 80 Fed. Reg. at 64,686-88.

129. *Fox*, 556 U.S. at 515.

130. 74 Fed. Reg. at 66,496, 66,511.

131. Attempts to disregard other well-founded facts underlying climate regulations would also be legally vulnerable. For example, there are reports that the Trump administration plans to make the benefits of climate regulations seem smaller by increasing the discount rates used to assess the social cost of carbon—an estimate of the benefits that a proposed regulation can achieve for each ton of carbon dioxide emissions it reduces. See Richard L. Revesz, *A Subtle Attack on the Environment*, U.S. NEWS & WORLD REPORT (Mar. 2, 2017), <https://www.usnews.com/opinion/articles/2017-03-02/donald-trump-and-scott-pruitt-could-gut-epa-rules-using-regulatory-analysis>. If EPA were to proceed down this path of increasing the discount rate, it would have to explain why it is ignoring economic consensus and its prior findings that a lower discount rate is appropriate, or risk having its regulations struck down for disregarding key factual findings. Chelsea Harvey, *The Coming Battle Between Economists and the Trump Team Over the True Cost of Climate Change*, WASHINGTON POST (Dec. 22, 2016), [https://www.washingtonpost.com/news/energy-environment/wp/2016/12/22/the-coming-battle-between-the-trump-team-and-economists-over-the-true-cost-of-climate-change/?utm\\_term=.8fb703c27f09](https://www.washingtonpost.com/news/energy-environment/wp/2016/12/22/the-coming-battle-between-the-trump-team-and-economists-over-the-true-cost-of-climate-change/?utm_term=.8fb703c27f09).

132. *Randall v. Sorrell*, 548 U.S. 230, 244 (2006) (“We cannot find in the respondents’ claims any demonstration that circumstances have changed so radically as to undermine *Buckley*’s critical factual assumptions”); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 855 (1991) (considering “whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application” when deciding whether to overrule a prior case).

belts.<sup>133</sup> Garland was counsel for the insurance companies in *State Farm* and according to him, the Court brushed aside the agency's explanations for rejecting the nondetachable belts and "in effect concluded that, given the available alternatives, factual record, and congressional purpose, a reasonable administrator would not have made the choice that [the Department of Transportation] did."<sup>134</sup> With climate change too, the Supreme Court has previously found that "[t]he harms associated with climate change are serious and well recognized."<sup>135</sup> It is entirely possible that a court would reject any attempt to ignore the copious evidence underlying EPA's endangerment finding and find a reversal of the endangerment finding to be arbitrary and capricious.

### 3. Reliance Interests

When an agency's "prior policy has engendered serious reliance interests" the agency is also required to provide "a more detailed justification than what would suffice for a new policy created on a blank slate."<sup>136</sup> This principle has been at issue in several recent cases challenging agency actions under the Obama administration.<sup>137</sup> For example, in *United States Telecom Association v. Federal Communications Commission*, the D.C. Circuit upheld the Federal Communications Commission's (FCC) new policy on broadband internet, finding that the FCC had adequately "considered the claims of reliance" and explained that they did not support the status quo: the FCC had explained that the prior regulatory status had only an "indirect effect (along with many other factors) on investment" and, in any event, that policy had been "settled for only a short period of time."<sup>138</sup>

In contrast, in *Encino Motorcars, LLC v. Navarro*, the Supreme Court struck down the Department of Labor's decision to require dealerships to pay service advisors overtime wages.<sup>139</sup> The Department of Labor had justified the new policy by stating that it was "more consistent with statutory language," but failed to analyze or explain why, beyond stating that it believed "that this interpretation is reasonable" and "sets forth the appropriate approach."<sup>140</sup> The Court held that this "summary discussion" doomed the rule because of the "decades of industry reliance on the Department's prior policy."<sup>141</sup>

133. Merrick B. Garland, *Deregulation and Judicial Review*, 98 HARV. L. REV. 507, 548 (1985) (discussing the *State Farm* opinion).

134. *Id.*

135. *Massachusetts v. EPA*, 549 U.S. 497, 521 (2007).

136. *Fox*, 556 U.S. at 515. *See Home Builders*, 682 F.3d at 1037.

137. *United States Telecom Ass'n v. FCC*, 825 F.3d 674 (D.C. Cir. 2016).

138. *Id.* at 709.

139. *Encino Motorcars*, 136 S.Ct. at 2117.

140. *Id.* at 2127.

141. *Id.* at 2126; *see also Landgraf v. USI Film Products*, 511 U.S. 244, 265 (1994) ("settled expectations should not be lightly disrupted"); *see also Hilton v. South Carolina Public Railways Commission*, 502 U.S. 197, 202 (1991) ("Stare decisis has added force when the legislature, in the public sphere, and citizens, in the private realm, have acted in reliance on a previous decision, for in this instance overruling the decision would dislodge settled rights and expectations. . .").



### III. STATUTORY REQUIREMENTS

Another source of significant limits on an agency's ability to repeal or suspend regulations is the governing statute.<sup>142</sup> Agencies must remain "within the bounds established by Congress" when deregulating.<sup>143</sup> As Judge Garland explained in his 1985 law review article, "[t]he original congressional intent—and not the shifting political tide—is the source of the agency's legitimacy" and "abrupt and profound alterations in an agency's course may signal a loss of fidelity to that original intent."<sup>144</sup>

#### A. Authority to Act

"[A]dministrative agencies may act only pursuant to authority delegated to them by Congress."<sup>145</sup> Accordingly, when issuing a new rule, whether it be a new regulation or a rule suspending or repealing a previous regulation, agencies must point to statutory authority for the action.<sup>146</sup>

This issue has been of particular relevance in recent attempts by the Trump administration to stay or suspend regulations. Generally speaking, under the APA, there is only one option for staying a rule, found in 5 U.S.C. § 705.<sup>147</sup> Section 705 is not available, however, after the rule has taken effect.<sup>148</sup> In addition, an agency's decision to stay the rule must be grounded "on the existence or consequences of the pending litigation," not any pending reconsideration.<sup>149</sup> And one lower court has held that the agency must address the standard for an injunction and show (1) the likelihood that petitioners will prevail on the merits of their petitions for review and (2) the likelihood that the petitioners "will be irreparably harmed absent a stay."<sup>150</sup> The agency must also address the "prospect that others

142. See generally 5 U.S.C. § 553.

143. *Home Builders*, 682 F.3d at 1043 (quoting *State Farm*, 463 U.S. at 59 (Rehnquist, J., concurring)).

144. Garland, *supra* note 163, at 585-586; see also *Am. Trucking Ass'n v. Frisco Transp. Co.*, 358 U.S. 133, 146 (1958) ("Of course, the power to correct inadvertent ministerial errors may not be used as a guise for changing previous decisions because the wisdom of those decisions appears doubtful in the light of changing policies"); see also *Coteau Properties Co. v. Dep't of Interior*, 53 F.3d 1466, 1478-79 (8th Cir. 1995) (rejecting a reconsideration that occurred after a change in presidential administrations).

145. *Id.*; see also *145.Clean Air Council*, 862 F.3d at 9 (quotation marks omitted).

146. *Id.*

147. *Id.*; see also 5 U.S.C. § 705.

148. *Id.*; see also *Safety-Kleen Corp. v. EPA*, 1996 U.S. App. LEXIS 2324, at \*2-3 (D.C. Cir. Jan. 19, 1996) (per curiam). In *State Farm*, the Court noted in dicta that "it would have been permissible for the agency to temporarily suspend the passive restraint requirement or to delay its implementation date while an airbag mandate was studied." *State Farm*, 463 U.S. at 48, n.15. But the agency would have needed to put any such suspension in place before the effective date. In fact, before the rescission at issue in *State Farm*, the agency had delayed the rule's effective date, but those suspensions were issued before the effective date actually passed. See also 40 Fed. Reg. 16,217 (Apr. 10, 1975); 42 Fed. Reg. 34,289, 34,290 (July 5, 1977) (listing effective date as September 1, 1981), 46 Fed. Reg. 21,172 (Apr. 9, 1981). In addition, any such suspension would have needed to comply with the D.C. Circuit's then-developing caselaw requiring agencies to go through notice and comment procedures prior to effectively revoking a regulation through delay. See *supra* Part I.B.

149. *Sierra Club*, 833 F. Supp. 2d at 33.

150. *Sierra Club*, 833 F. Supp. 2d at 30; *Jeffrey v. Office of Pers. Mgmt.*, 28 M.S.P.R. 434, 435-36 (Merit Systems Protection Board 1985).

will be harmed if the court grants the stay” and “the public interest in granting the stay” before granting it.<sup>151</sup>

In a pair of examples, two different bureaus within the Department of the Interior postponed two rules under section 705 of the APA, even though those rules had already become effective.<sup>152</sup> The U.S. District Court for the Northern District of California ruled that both suspensions were illegal because section 705 of the APA did not authorize the agency to suspend rules after they were already effective.<sup>153</sup>

Section 307 of the Clean Air Act provides authority to suspend a regulation, but any suspensions issued under that authority must comply with strict limits.<sup>154</sup> For example, section 307 limits suspensions to three months.<sup>155</sup> In addition, in order to invoke this provision, EPA must demonstrate that petitioners raised an objection that was ““impracticable to raise”” during the public comment period and that was ““of central relevance to the outcome of the rule.””<sup>156</sup>

The D.C. Circuit recently vacated a stay issued under section 307, holding that the agency had not shown that the statute authorized the stay.<sup>157</sup> In that case, EPA had postponed an Obama-era rule governing methane emissions from new oil and gas facilities.<sup>158</sup> The agency claimed that industry petitioners had not had an opportunity to raise four objections before the rule was finalized and that those issues thus merited reconsideration under section 307.<sup>159</sup> But the court examined the record and concluded that EPA’s claim that those issues could not have been raised was “inaccurate and thus unreasonable.”<sup>160</sup> Not only could the issues have been raised, but industry petitioners actually did raise the objections prior to EPA’s finalization of the rule.<sup>161</sup> The Court emphasized that its opinion did not bar EPA from proceeding to reconsider the methane rule.<sup>162</sup> But any decision to reconsider the rule must show that ““the new policy is permissible under the statute, . . . there are good reasons for it, and . . . the agency *believes* it to be better”” than the current and legally enforceable methane rule.<sup>163</sup>

---

151. *Sierra Club*, 833 F. Supp. 2d at 30; *Jeffrey*, 28 M.S.P.R. at 435–36.

152. *See e.g.*, 82 Fed. Reg. at 11823 (Interior rule staying a 2016 rule that reformed the royalty rules governing coal, oil, and gas production on federal land); 82 Fed. Reg. 27430 (BLM rule staying the Waste Prevention Rule).

153. *Becerra v. Dep’t of Interior*, 17-cv-02376-EDL, 2017 WL 3891678, at \*1 (N.D. Cal. Aug. 30, 2017); *California v. Bureau of Land Management*, slip op. at \*22 (No. 17-3885) (N.D. Cal. Oct. 4, 2017).

154. 42 U.S.C. § 7607(d)(7)(B).

155. *Id.*

156. *Clean Air Council*, 862 F.3d at 5.

157. *Id.*

158. *Id.* at 8.

159. *Id.* at 10.

160. *Id.*

161. *See generally Clean Air Council*, 862 F.3d at 14.

162. *Id.* (quoting *Fox*, 556 U.S. at 515).

163. *Id.*

Agencies may not use their general rulemaking authority to stay rules outside of these statutorily authorized bounds.<sup>164</sup> The D.C. Circuit has held, for instance, that the EPA cannot use the Clean Air Act's "general grant of rulemaking power" to stay regulations that could not be delayed using the agency's explicit—but tightly circumscribed—stay power under section 307 of that statute.<sup>165</sup> And issuing a stay through a notice and comment rulemaking does not enlarge the agency's stay authority beyond that provided in the statute.<sup>166</sup>

### B. Mandated Factors

Statutes also often contain factors that an agency must consider when issuing a new rule or repeal. And any repeal or replacement rule that fails to consider a statutorily mandated factor would be arbitrary and capricious.<sup>167</sup> For example, in a 2004 case, the D.C. Circuit found that a rule revising the number of hours that truck drivers could operate their vehicles "was arbitrary and capricious, because the [agency] failed to take account of a statutory limit on its authority," specifically the requirement that the agency consider the impact of its rule on driver health.<sup>168</sup>

As another example, some statutes, such as the Energy Policy and Conservation Act, include specific provisions restricting any attempts to weaken standards once they have been established by rulemaking.<sup>169</sup> An agency seeking to weaken or roll back regulations under such a statute would be barred from doing so.<sup>170</sup>

### C. Ambiguous or Unambiguous Statute

In addition, if an agency decides to change its view of the proper interpretation of the statute, that new interpretation must be permissible under the statute.<sup>171</sup> On the one hand, where a statute is clear, an agency cannot choose an interpretation that conflicts with that clear language. For example, if a court held that the agency's "construction follows from the unambiguous terms of the statute and

---

164. *Nat'l Min. Ass'n v. U.S. Dep't of the Interior*, 105 F.3d 691, 694 (D.C. Cir. 1997) ("general rulemaking provisions . . . do not . . . permit [an agency] to trump Congress's specific statutory directive"); see also *Am. Petroleum Inst. v. EPA*, 52 F.3d 1113, 1119 (D.C. Cir. 1995).

165. *Nat. Res. Def. Council, Inc. v. Reilly*, 976 F.2d 36, 41 (D.C. Cir. 1992) (addressing stay authority under section 307 of the Clean Air Act).

166. *Id.*

167. *Pub. Citizen v. Fed. Motor Carrier Safety Admin.*, 374 F.3d 1209, 1216 (D.C. Cir. 2004).

168. *Id.* at 1211, 1216; see also *Hearth, Patio & Barbecue Ass'n v. U.S. Dep't of Energy*, 706 F.3d 499 (D.C. Cir. 2013) (vacating rule where agency had regulated decorative fireplaces because Congress unambiguously did not authorize the agency to regulate them).

169. 42 U.S.C. § 6295(o)(1) (2007); see also *NRDC v. Abraham*, 355 F.3d 179 (2d Cir. 2004).

170. 42 U.S.C. § 6295(o)(1) (2007).

171. *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005) (citing *Chevron v. NRDC*, 467 U.S. 837, 865–866 (1984)). See also *Indep. U.S. Tanker Owners Comm. v. Dole*, 809 F.2d 847, 849 (D.C. Cir. 1987) ("We find that the Secretary was well within her statutory authority in promulgating the rule, but that she failed to provide an adequate account of how the rule serves the objectives set out in the governing statute. . . .").

thus leaves no room for agency discretion,” the “court’s prior [judicial] construction of a statute trumps an agency construction.”<sup>172</sup> Even if the court’s earlier interpretation was decided pre-*Chevron* or did not use the term “unambiguous” to characterize the statute, once a court establishes a statute’s “clear meaning,” there is no longer any ambiguity for the agency to resolve, and the court’s interpretation prevails.<sup>173</sup> Both pre- and post-*Chevron* decisions using the terms “clear” and “plain” to describe the text, rather than “unambiguous,” similarly support terminating the inquiry at *Chevron* step one and requiring the agency to maintain its interpretation consistent with the principles laid out by the court in earlier decisions.<sup>174</sup>

For example, in *Massachusetts v. EPA*, the Court held that greenhouse gases such as carbon dioxide, methane, nitrous oxide, and hydrofluorocarbons are “without a doubt” air pollutants that are covered by the Clean Air Act.<sup>175</sup> The court then held that EPA could not abdicate its responsibility to determine whether greenhouse gases endangered human health and welfare under section 202(a) of the Clean Air Act.<sup>176</sup> Given those holdings, EPA does not have discretion to interpret the Clean Air Act as barring it from regulating greenhouse gases.

But on the other hand, when there is more than one reasonable interpretation available to the agency, an agency’s decision to adopt a new view of the statutory text may be permissible as long as it is one of the reasonable options for interpreting the statute and is accompanied by a sufficient explanation.<sup>177</sup> As the Court explained in *Brand X*, agencies are “free within the limits of reasoned interpretation to change course,” but they must “adequately justif[y] the change.”<sup>178</sup> In *Brand X*, the Court reviewed the FCC’s changed position exempting cable companies from regulation under the Telecommunications Act—regulations which would have required cable companies to comply with common carrier rules and sell access to their networks to competing internet service providers. The Court

---

172. *Brand X Internet Servs.*, 545 U.S. at 982. This rationale does not apply if the agency still has discretion to interpret the statute under *Chevron* step two.

173. *Maislin Indus. U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 131 (1990) (explaining that, even for a statute interpreted in 1908, “[o]nce we have determined a statute’s clear meaning, we adhere to that determination under the doctrine of *stare decisis*, and we judge an agency’s later interpretation of the statute against our prior determination of the statute’s meaning”).

174. *New York v. EPA*, 443 F.3d 880, 886 (D.C. Cir. 2006) (“The fact that previous judicial interpretations of section 111(a)(4) have all reached the conclusion that the text must be read broadly supports the petitioner’s argument at *Chevron* step one, particularly because those decisions — both before and after *Chevron* — used language indicating the text was ‘clear’ and ‘plain’”).

175. *Massachusetts v. EPA*, 549 U.S. 497, 527 (2007).

176. *Id.* at 534 (“Nor can EPA avoid its statutory obligation by noting the uncertainty surrounding various features of climate change and concluding that it would therefore be better not to regulate at this time”).

177. *See generally* *Brand X Internet Servs.*, 545 U.S. at 967; *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2124 (2016) (“when an agency is authorized by Congress to issue regulations and promulgates a regulation interpreting a statute it enforces, the interpretation receives deference if the statute is ambiguous and if the agency’s interpretation is reasonable”).

178. *Brand X Internet Servs.*, 545 U.S. at 1001 (2005).

held that the Act allowed for “two or more reasonable” interpretations and affirmed the FCC’s decision to change course and exempt cable companies from the common carrier rules instead.<sup>179</sup>

Nonetheless, even where there is more than one reasonable interpretation, in reviewing an agency’s explanations, the consistency of the explanations may be considered in determining whether to uphold the new interpretation.<sup>180</sup> As the D.C. Circuit has held, an agency’s consistent interpretation of a statutory provision for over three decades “tends to show” that the agency’s “practice is a reasonable and hence legitimate exercise of its discretion.”<sup>181</sup> And, conversely, the “reasonableness of an agency’s statutory interpretation is dependent in part on the consistency with which the interpretation is advanced.”<sup>182</sup> “[A]gencies are *not* free, under *Chevron*, to generate erratic, irreconcilable interpretations of their governing statutes. . . . [C]onsistency over time and across subjects is a relevant factor [under *Chevron*] when deciding whether the agency’s current interpretation is ‘reasonable.’”<sup>183</sup> Thus, “[a] statutory interpretation . . . that results from an unexplained departure from prior [agency] policy and practice is not a reasonable one.”<sup>184</sup> And the fact that an agency has changed a statutory interpretation can cause a court to question the validity of an agency’s new interpretation. In the context of the Clean Power Plan, EPA has proposed to repeal the rule on the ground that the Clean Air Act does not authorize EPA to set guidelines that are based in part on the reductions that could be achieved by shifting electricity generation from dirtier to cleaner generation sources.<sup>185</sup> But EPA previously found that the Clean Air Act did authorize it to consider those potential reductions.<sup>186</sup> If EPA finalizes the repeal, a question for judicial review will likely be whether EPA has provided a sufficient explanation for changing its mind. And, as the Court stated in *Massachusetts*, EPA does not have a “roving license” to ignore the Clean

179. *Id.* at 991 (2005).

180. *Id.*

181. *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 224 (2009). *See also* *Alaska Dep’t of Envtl. Conservation v. EPA*, 540 U.S. 461, 487 (2004); *see also* *Nat’l Ass’n of Regulatory Util. Comm’rs v. ICC*, 41 F.3d 721, 726-27 (D.C. Cir. 1994) (recognizing that *Chevron* step two “overlaps analytically” with arbitrary and capricious review under the APA).

182. *Castillo v. United States Att’y Gen.*, 729 F.3d 296, 311 (3d Cir. 2013) (failure to “reconcile, reject, or otherwise explain its inconsistent decisions” required remand).

183. *Valdiviezo-Galdamez v. United States Att’y Gen.*, 663 F.3d 582, 604 (3d Cir. 2011) (inconsistent interpretation was unreasonable).

184. *Goldstein v. SEC*, 451 F.3d 873, 883 (D.C. Cir. 2006).

185. *Repeal of Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units*, 82 Fed. Reg. 48,035, 48,037-38 (proposed Oct 16, 2017) (asserting that the Clean Power Plan “is not within Congress’s grant of authority to the Agency under the governing statute,” and “exceeds the bounds of the statute”). *See also* Brief for Petitioner at 12, *West Virginia v. EPA*, 136 S.Ct. 1000 (D.C. Cir. 2016) (No. 15-1363) (Scott Pruitt, then the Attorney General of Oklahoma, and several other State Attorneys General argued as much in the D.C. Circuit litigation challenging the Clean Power Plan, before the recent change in administration).

186. *Final Rule, Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units*, 80 Fed. Reg. 64,662, 64,760-61 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60). The agency relied in part on the fact that it has repeatedly—over decades and through administrations of both parties—interpreted section 111(d) and analogous sections to encompass the consideration of flexible compliance mechanisms. *See also* Richard L. Revesz, Denise A. Grab, and Jack Lienke, *Familiar Territory: A Survey of Legal Precedents for the Clean Power Plan*, 46 *Envtl. L. Rep.* 10,190 (2016).

Air Act.<sup>187</sup> Instead, Congress directed EPA to exercise its discretion “within defined statutory limits.”<sup>188</sup> As the Court explained, “EPA may not decline to regulate carbon-dioxide emissions from power-plants if refusal to act would be ‘arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.’”<sup>189</sup>

Eventually, EPA’s failure to comply with the statutory duty to regulate greenhouse gases could come home to roost.<sup>190</sup> For example, in *Public Citizen v. Steed*, the court held that the record did not support NHTSA’s finding that a “variability” problem justified suspending portions of its tire grading requirements, “rather than retaining them while improvements in the test procedures and in the manufacturers’ grade assignment practices could be developed.”<sup>191</sup> The Court vacated NHTSA’s suspension of the requirements stating: “It is hard to imagine a more sorry performance of a congressional mandate than that carried out by NHTSA and its predecessors under section 203 of the Act. Between inaction, foot-dragging, and field reversal, the track record of agency performance is very muddy indeed.”<sup>192</sup>

#### IV. ASSESSMENT OF COSTS AND BENEFITS

As explained above, see *supra* II.C, when issuing a rule or repeal, an agency must (1) “examine the relevant data” and (2) “articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’”<sup>193</sup>

An important category of “relevant data” that an agency should examine is the cost of the new rulemaking.<sup>194</sup> A number of statutes and executive orders specifically require the consideration of costs and benefits when issuing rules.<sup>195</sup> For example, section 112(n)(1)(A) of the Clean Air Act requires EPA to regulate power plant emissions of hazardous air pollutants if EPA “finds such regulation is appropriate and necessary,” and the Supreme Court interpreted this language to require a consideration of costs.<sup>196</sup> And the Clean Water Act expressly requires EPA to consider “costs” when issuing wastewater discharge standards.<sup>197</sup>

---

187. *Id.* (quoting 549 U.S. at 533).

188. *Id.*

189. *Id.* (quoting § 7607(d)(9)(A)).

190. *See generally* *Pub. Citizen*, *supra* note 64.

191. *Id.* at 99-100.

192. *Id.* at 105.

193. *State Farm*, 463 U.S. at 43.

194. *See generally* *Michigan*, 135 S.Ct. at 2707 (emphasizing that courts should pay attention to the “disadvantages of agency decisions”).

195. *See e.g.*, 42 U.S.C. § 7412(n)(1)(A) (2017); 33 U.S.C. § 1314(b)(2)(B) (2017).

196. 42 U.S.C. § 7412(n)(1)(A).

197. 33 U.S.C. § 1314(b)(2)(B).

In addition, when an agency has relied on costs and benefits in the analysis supporting a rule, the APA requires the agency to provide a satisfactory explanation of that analysis.<sup>198</sup> Though courts generally will not reverse “simply because there are uncertainties, analytic imperfections, or even mistakes in the pieces of the picture petitioners have chosen to bring to [the court’s] attention,” courts do examine whether the agency’s analysis was reasonable, and reverse where “there is such an absence of overall rational support as to warrant the description ‘arbitrary or capricious.’”<sup>199</sup> Thus, “[w]hen an agency decides to rely on a cost-benefit analysis as part of its rulemaking, a serious flaw undermining that analysis can render the rule unreasonable.”<sup>200</sup> For example, a lopsided reliance on either the costs or the benefits of a rule would render the decision arbitrary and capricious.<sup>201</sup>

Executive Order No. 12,866, the main executive order that has governed regulatory decision-making since 1993 and continues to govern today, also instructs agencies to “propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs.”<sup>202</sup> Though the specific guidance in Executive Order 12,866 is not itself judicially enforceable, an

---

198. *Chamber of Commerce v. SEC*, 412 F.3d 133, 144 (D.C. Cir. 2005) (agency was required to consider the “economic consequences of a proposed regulation” in order to comply with the statutory requirement to consider the public interest and the APA’s requirement of a satisfactory explanation). *See also* *Competitive Enter. Inst. v. NHTSA*, 956 F.2d 321 (D.C. Cir. 1992) (agency was required to explain whether safety concerns outweighed benefits of energy savings in new fuel economy standards); *Ctr. for Biological Diversity v. NHTSA*, 538 F.3d 1172, 1200 (9th Cir. 2008) (“NHTSA’s decision not to monetize the benefit of carbon emissions reduction was arbitrary and capricious”).

199. *Ctr. for Auto Safety v. Peck*, 751 F.2d 1336, 1370 (D.C. Cir. 1985). *See* Caroline Cecot & W. Kip Viscusi, *Judicial Review of Agency Benefit-Cost Analysis*, 22 *GEO. MASON L. REV.* 575, 591 (2015) (cataloging and analyzing cases showing judicial disapproval of agency cost-benefit analysis).

200. *Home Builders*, 682 F.3d at 1040.

201. *Johnston v. Davis*, 698 F.2d 1088, 1094-95 (10th Cir. 1983) (remanding an environmental impact statement because it made “no mention” of a crucial factor that would make the action net costly); *Sierra Club v. Sigler*, 695 F.2d 957, 979 (5th Cir. 1983) (holding if agency “trumpets” economic benefits, it must also disclose costs); *Ctr. for Biological Diversity*, 538 F.3d at 1200 (agency’s failure to monetize the cost of carbon emissions was arbitrary and capricious because “while the record shows that there is a range of values, the value of carbon emissions reduction is certainly not zero”).

202. The Trump administration has stated that Executive Order 12,866 is the “governing EO regarding regulatory planning and review.” Memorandum: Implementing Executive Order 13,771 on Reducing Regulation and Controlling Regulatory Costs (Apr. 5, 2017) (*available at* <https://www.whitehouse.gov/the-press-office/2017/04/05/memorandum-implementing-executive-order-13771-titled-reducing-regulation>) [hereinafter *Guidance on Executive Order 13,771*]; Exec. Order No. 12,866 § 1(b)(6), 58 *Fed. Reg.* 51,735 (Sept. 30, 1993) [hereinafter *Executive Order 12,866*]. The cost-benefit analysis requirements of Exec. Order 12,866 do not apply to independent agencies. *Id.* at § 3(b). The Office of Information and Regulatory Affairs has clarified that the regulatory cost analysis required by President Trump’s Exec. Order 13,771 likewise does not apply to independent agencies. *See* *Guidance on Executive Order 13,771*. Legal scholars disagree about the extent to which the president could require independent agencies to follow these regulatory analysis guidelines. *See* Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 *CORNELL L. REV.* 769, 773 (2013). Nonetheless, some independent agencies do follow this guidance for economic analysis, either voluntarily or due to other statutory requirements. *See, e.g.,* Richard L. Revesz, *Cost-Benefit Analysis and the Structure of the Administrative State: The Case of Financial Services Regulation*, 34 *YALE J. ON REG.* 545, 549 (2017); Caroline Cecot, *Make Economics at the FCC Great Again*, *TECHNOLOGY POLICY INSTITUTE* (Apr. 14, 2017), <https://techpolicyinstitute.org/2017/04/14/make-economics-at-the-fcc-great-again>.

agency's explanations under the order are subject to the APA's arbitrary and capricious standard.<sup>203</sup> The instruction to consider costs and benefits is supported by common sense: it is difficult "for a regulatory agency to make a rational decision without considering costs in some way" because "[a]ll individuals and institutions naturally and instinctively consider costs in making any important decision."<sup>204</sup>

On repeal, when an agency has used costs and benefits to issue the original regulations, those calculations are just as relevant when suspending or repealing the regulation.<sup>205</sup> Executive Order 12,866 makes clear that the instruction to consider costs and benefits applies to any "regulation" or "rule" that "the agency intends to have the force and effect of law, that is designed to implement, interpret, or prescribe law or policy or to describe the procedure or practice requirements of an agency."<sup>206</sup> There can be no doubt that a repeal would qualify as a rule or regulation under the Executive Order.<sup>207</sup> A stay also falls under this provision because it "represents the final agency position on this issue, has the status of law, and has an immediate and direct effect on the parties."<sup>208</sup> The cost-benefit analysis that accompanied the original rule will be considered part of the record for the repeal or stay, and it will be available to advocates or courts reviewing the repeal.<sup>209</sup> If the agency departs from the conclusions of its original cost-benefit analysis, it will have to offer a reasoned explanation as to why.

One category of costs imposed by a new rule repealing or suspending an existing regulation comes from delaying the benefits of the existing regulation—the forgone benefits.<sup>210</sup> Costs include any negative consequences of a regulatory action, not just compliance burdens on industry.<sup>211</sup> The Supreme Court has indicated that an agency assessment of regulatory costs should include "harms that regulation might do to human health or the environment."<sup>212</sup> Executive Order 12,866 similarly instructs agencies to consider "any adverse effects . . . on health, safety and the natural environment" when assessing a regulation's costs.<sup>213</sup>

203. Guidance on Executive Order 13,771.

204. Richard J. Pierce, Jr., *The Appropriate Role of Costs in Environmental Regulation*, 54 ADMIN. L. REV. 1237, 1247 (2002). See Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 493 (1989) (Rational regulations look at the benefits of a rule and assess those benefits "in comparison to the costs").

205. *California v. Bureau of Land Management*, slip op. at \*18-20 (No. 17-3885) (N.D. Cal. Oct. 4, 2017) (holding that the agency's failure to consider the forgone benefits on a suspension was arbitrary and capricious); see also *Mingo Logan Coal Co.*, 829 F.3d at 730 (Kavanaugh, J., dissenting) (considering the costs of a repeal "is common sense and settled law"); see also *Home Builders*, 682 F.3d at 1039 (finding that the agency properly calculated the costs of amending a regulation).

206. Exec. Order 12,866 § 3 (d).

207. See, e.g., *Consumer Energy Council of Am.*, 673 F.2d at 445.

208. *Clean Air Council*, 862 F.3d at 6.

209. See Garland, *supra* note 130, at 573.

210. *Id.*

211. *Michigan v. EPA*, 135 S.Ct. 2699, 2707 (2015) ("'[C]ost' includes more than the expense of complying with regulations; any disadvantage could be termed a cost").

212. *Id.* at 2707. See *Competitive Enter. Inst.*, 956 F.2d at 326-27 (holding that agency should have considered indirect costs in the form of safety risks associated with the smaller size of more fuel-efficient cars).

213. Exec. Order 12,866 § 6(a)(3)(C)(ii).



And as the Office of Management and Budget has recognized, even just a suspension can have “an important effect” on the rule’s net benefits.<sup>214</sup> For example, a delay of an emissions limit can cause “significant deleterious effects on the environment.”<sup>215</sup> Some agencies headed by Trump appointees have recognized this. For example, Labor recently acknowledged that a delay of a rule designed to protect retirees’ investment decisions can cost millions of dollars of investment gains to retirees.<sup>216</sup> And the Food and Drug Administration acknowledged that a delay of one year in a nutritional labeling requirement can mean millions of dollars in lost health benefits.<sup>217</sup> An agency is as obligated to consider these forgone benefits as it is to consider any other form of cost.<sup>218</sup>

To date, one stay has been struck down for violating these principles.<sup>219</sup> BLM had issued a rule preventing waste of natural gas at oil and gas facilities, finding that the rule was justified on the basis of net benefits of \$50 to \$204 million per year.<sup>220</sup> But BLM then suspended the rule indefinitely and did not even mention these forgone benefits.<sup>221</sup> The U.S. District Court of the Northern District of California vacated the stay holding that “to look at only one side of the scales, whether solely the costs or solely the benefits” fails to address “an important aspect of the problem,” as required by the Supreme Court.<sup>222</sup>

There are a few other examples where courts may strike stays down on these grounds. For example, EPA stayed a rule limiting wastewater discharges without considering the forgone benefits of the discharge limits.<sup>223</sup> EPA had calculated the benefits of the rule and thus could have easily calculated the forgone benefits in the stay.<sup>224</sup> Instead, EPA asserted that the stay was necessary because of the “capital expenditures that facilities” would need to undertake during the time that EPA is reconsidering the rule, while failing to even mention the forgone benefits.<sup>225</sup>

---

214. OFFICE OF MGMT. & BUDGET, OMB CIRCULAR A-4 7 (2003) [hereinafter Circular A-4]. The current administration has instructed agencies to follow Circular A-4, originally issued under President George W. Bush. See Guidance on Executive Order 13,771 at 11.

215. *Sierra Club*, 833 F. Supp. 2d at 36; see also *Davis Cty. Solid Waste Mgmt. v. EPA*, 108 F.3d 1454, 1458 (D.C. Cir. 1997) (describing substantial emissions that vacating EPA’s emissions limit would impose).

216. See Proposed Rule & Extension of Applicability Date, Definition of the Term “Fiduciary”; Conflict of Interest Rule, 82 Fed. Reg. 12,319, 12,320 (March 2, 2017) (to be codified at 29 C.F.R. pt. 2510).

217. Interim Final Rule, Food Labeling; Nutrition Labeling of Standard Menu Items in Restaurants and Similar Retail Food Establishments; Extension of Compliance Date; Request for Comments, 82 Fed. Reg. 20,825, 20,828 (May 4, 2017) (to be codified at 21 C.F.R. pts. 11, 101).

218. See generally *California*, 2017 WL 4416409, at \*11; *State of N.Y. v. Reilly*, 969 F.2d 1147, 1153 (D.C. Cir. 1992) (remanding rule where agency failed to explain how economic benefits would justify foregoing the promised air benefits); see also Circular A-4 at 19 (instructing agencies to monetize “foregone benefits” when calculating the costs and benefits of the alternatives under consideration).

219. *California*, 2017 WL 4416409, at \*11.

220. *Id.* at 83,010-13.

221. 82 Fed. Reg. at 27,430.

222. *California v. Bureau of Land Management*, slip op. at \*19 (quoting *State Farm*, 463 U.S. at 43).

223. 80 Fed. Reg. at 67,838.

224. 80 Fed. Reg. at 67,873-78.

225. 82 Fed. Reg. at 26,018.

In a similar example, EPA has proposed a second stay of a rule limiting methane discharges by new and modified oil and gas facilities.<sup>226</sup> The first stay was already struck down by the D.C. Circuit in *Clean Air Council v. Pruitt*.<sup>227</sup> In the proposal to stay the rule a second time, EPA failed to analyze the forgone benefits of the methane rule.<sup>228</sup> EPA admitted that “there would be forgone benefits as a result” of the proposed delay, but concluded that “a quantitative estimate of this effect is not currently available.”<sup>229</sup> This claim is vulnerable because EPA calculated the benefits of the methane rule.<sup>230</sup> It is yet to be seen whether EPA will finalize this stay.

## V. CONCLUSION

Although the Executive Branch has considerable leeway to revisit and change regulations adopted by prior administrations, such changes are subject to a well-established set of procedural constraints that apply to repealing or suspending regulations.<sup>231</sup> This is not the first time that an incoming administration has tried to roll back regulations issued by a prior administration.<sup>232</sup> In the early 1980s, the Reagan administration unsuccessfully attempted substantial rollbacks of many agency regulations.<sup>233</sup> President George W. Bush also attempted to weaken several regulations promulgated under the Clinton administration.<sup>234</sup> For example, President Bush targeted the Forest Service’s Roadless Rule and EPA’s finding that it was “appropriate and necessary” to regulate mercury and other toxic air emissions from power plants.<sup>235</sup> When those rollbacks did not comply with the APA or the specific statutes under which they were issued, courts struck them down.<sup>236</sup> And President Obama too, attempted to change agency regulations only to trip up on the procedural requirements that govern such reversals.<sup>237</sup>

---

226. *Clean Air Council*, 862 F.3d at 6.

227. *Id.*

228. *Id.* at 5.

229. Proposed Rule, Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources: Stay of Certain Requirements, 82 Fed. Reg. 27,645, 27,650 (June 16, 2017) (to be codified at 40 C.F.R. pt. 60).

230. See Final Rule, Oil and Natural Gas Sector: Emissions Standards for New, Reconstructed, and Modified Sources, 81 Fed. Reg. 35,824, 35,886-88 (June 3, 2016) (to be codified at 40 C.F.R. pt. 60).

231. Stuart Shapiro, *What New Presidents Can (and Cannot) Do About Regulation*, THE HILL (Sept. 27, 2017, 7:30 AM), <http://thehill.com/blogs/pundits-blog/presidential-campaign/264084-what-new-presidents-can-and-cannot-do-about>.

232. See generally Robert E. Litan, *Regulatory Policy in the Second Reagan Term*, THE BROOKINGS REVIEW, Vol. 3, No. 3 (Spring 1985).

233. See Litan, *supra* note 32 at 21, 24 (listing the numerous regulations that the Reagan administration attempted to repeal and the subsequent judicial reversals); see also Jeremy P. Jacobs, *Rescinding Obama regs? Not so fast, legal scholars say*, GREENWIRE (Nov. 11, 2016), <https://www.eenews.net/stories/1060045632>.

234. See, e.g., Organized Vill. of Kake v. USDA, 795 F.3d 956, 969 (9th Cir. 2015) (remanding amendments to Roadless Rule); *New Jersey v. EPA*, 517 F.3d 574 (D.C. Cir. 2008) (vacating Bush-era decision to delist sources of mercury pollution).

235. *New Jersey*, 517 F.3d at 578.

236. See generally *Kake*; *New Jersey*.

237. See generally, e.g., *Encino Motorcars*, 136 S.Ct. at 2126.

Many recent actions by Interior, DOE, and EPA have not complied with the APA either. The remedy for non-compliance with such norms can involve reinstating the original rule, including reinstating the original deadlines—creating substantial uncertainty for the regulated companies.<sup>238</sup> Even an agency that seeks to deregulate cannot “undo all it accomplished through its rulemaking without giving all parties an opportunity to comment on the wisdom of repeal.”<sup>239</sup> Though perhaps time-consuming, these procedures are a bedrock of American law and they are crucial to protecting the public against agency overreach and arbitrariness. Any effort to deregulate should take care to comply with this settled law.

---

238. NRDC, 683 F.2d at 763 (remedy for an invalid stay was to hold that amendments went into effect on original effective date); accord *Civil Aeronautics Bd.*, 713 F.2d at 798-802 (reinstating prior regulations after agency violated the APA’s notice and comment requirements in attempt to re-publish rescinded smoking rule).

239. *Env’tl. Def. Fund, Inc.*, 713 F.2d at 816–17.